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IN THE

# Supreme Court of the United States

October Term, 1970

No. 637

PARLEY PROBST,
*Petitioner,*

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, AND ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## Brief for Respondent, Ute Indian Tribe of the Uintah and Ouray Reservation, in Opposition

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. III of Petition) and the *per curiam* opinion on rehearing (App. IV of Petition) are not yet reported. No opinion was rendered by the District Court for the District of Utah, but its Findings of Fact and Conclusions of Law (App. II of Petition) and Judgment (App. I of Petition) appear in the Appendix of the Petition.

## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 20, 1970. A timely petition for rehearing was denied on June 5, 1970, and the petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 United States Code §1254(1).

## QUESTIONS PRESENTED

A statute of the United States, Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. §677 et seq.), provided for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; and for the termination of federal supervision over the property of the mixed-blood members of said tribe; and provided for a development program for the full-blood members; and for other purposes. The questions presented are:

1. Whether, under the circumstances of this case, said act conferred upon the Ute Indian Tribe a right to meet the price at which the selling mixed-blood offered land acquired from tribal assets.

2. Whether this action by the Ute Indian Tribe was barred by the Utah Statute of Limitations or by waiver or laches.

3. Whether petitioner Probst was deprived of his property without due process of law contrary to the Fifth Amendment to the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of August 27, 1954 (68 Stat. 868, 25 U.S.C. §677 et seq.), and the regulations involved (25 C.F.R. §243 et seq., 1966 Ed.) are set forth in the Petition Appendix, pages A-60-62, A-63, A-67, respectively, except Sections 5 and 8 of the Act of August 27, 1954 which were as folows:

> Section 5. Effective on the date of publication of the final rolls as provided in section 8 hereof the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act. (68 Stat. 868, 25 U.S.C. §677[d]).
>
> Section 8. The tribe shall have a period of thirty days from the date of enactment of this Act in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on the date of enactment of this Act. If the tribe fails to submit such proposed rolls within the time specified in this Act, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of

> all such appeals to the Secretary, and after all transfers have been made pursuant to Section 4 hereof the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of this Act. (68 Stat. 869, 25 U.S.C. §677[g]).

Sections 5 and 8 were both amended on August 2, 1956 by adding, at the end of Section 5, the following sentence:

> New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder. (70 Stat. 936, 25 U.S.C. §677[d]).

and by adding, at the end of Section 8, the following:

> , but this Act shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after the date of enactment of this Act, in the manner provided in the constitution and bylaws of the tribe. (70 Stat. 936, 25 U.S.C. §677[g]).

Other sections only incidentally involved will be quoted in the Argument.

## STATEMENT OF THE CASE

Petitioner's Statement of the Case is argumentative, inaccurate, misleading and prolix with minutiae immaterial to the consideration of the questions presented. We venture our statement with the hope of being helpful to the court. The inaccuracies and misleading statements of petitioner will be discussed in our argument.

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. §1362 because the action was brought

by an Indian Tribe under the Act of August 27, 1954, 25 U.S.C. §677 et seq.

The respondent Ute Indian Tribe sued for certain equitable relief and for cancellation of a deed given by respondent Orianna B. Moosman as administratrix of the Estate of Elizabeth Bumgarner Poowegup to petitioner Parley Probst. Petitioner, at the trial, asserted the validity of the deed and counterclaimed for damages. The administratrix denied that the Tribe was entitled to equitable relief, but by way of cross-claim against the petitioner Probst, asserted that the deed to him was void. The District Court held that the administratrix was entitled to the land. Both the Tribe and Probst appealed.

The Court of Appeals for the Tenth Circuit reversed and remanded the case for further proceedings, granting the Tribe the equitable relief sought. (App. III of Petition).

The assets of the Tribe were divided between the full-blood and mixed-blood groups as required by the Act of August 27, 1954 (25 U.S.C. §677[i]). After a plan was adopted for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof was prepared as required by 25 U.S.C. §677[l]. If a majority of the mixed-blood group decided that partition of any land was impracticable and, if the Secretary of the Interior approved, the land could be sold and the proceeds divided among the members of the group. (25 U.S.C. §677[l]-(5), App. XI of Petition, p. A-61). In the division between the two groups, the mixed-bloods received the 3,200 acres of land

in question. They decided that partition was impracticable and that the land should be sold. It was appraised at $26,600.00. Secretarial approval was not an issue in that transaction.

Elizabeth Bumgarner, who later married, acquiring the additional name of Poowegup, submitted the high bid of $26,016.00 for the land which was advertised to the mixed-bloods only. She did not have the necessary money and interested the petitioner in the land. Before the termination of federal supervision, a mixed-blood could dispose of his interest in acquired tribal property only with the approval of the Secretary. (25 U.S.C. §677[n]. App. XI of Petition, p. A-61; 25 C.F.R. 243.3 [1966 Ed.], App. XII of Petition, p. A-64). Federal supervision over tribal land terminated when a patent issued thereto. (25 C.F.R. §243.2[h], App. XII of Petition, p. A-64). Until August 27, 1964 a patent conveying any tribal land to a mixed-blood had to provide that until that date members of the Tribe had the right of first refusal of an offer to sell. (25 U.S.C. §677[n], App. XI of Petition, p. A-61; 25 C.F.R. §243.4, App. XII of Petition, p. A-65). A written contract was prepared and executed on October 28, 1959 whereby Elizabeth sold to petitioner for $35,000.00 and petitioner went into immediate possession. (App. V of Petition). The contract recognized that no patent had been issued and that Elizabeth would have to comply with the first refusal provision of the statute. Elizabeth gave petitioner a $35,000.00 mortgage on the land to assure compliance with the contract terms. (App. VII of Petition). The mortgage was duly recorded. It did not state the nature of the contract it secured and made no reference to a sale. Neither the contract nor

the mortgage was submitted to the Secretary for his approval.

On August 11, 1960 the Secretary promulgated regulations as authorized by the act (25 U.S.C. §677[z]. See 25 C.F.R. §§243.1-243.12 [1966 Ed.]). A patent was issued to Elizabeth on September 20, 1960. (App. IX of Petition). It contained the first refusal provision required by the statute and regulations. On November 11, 1960 Elizabeth and petitioner executed an amendment to the October 28, 1959 contract. (App. VI of Petition). It provided that certain escrow funds be released to Elizabeth; that the required offering should not be made "until such time as the party of the first part [petitioner] requests that the same be made"; and that if such offering were made at petitioner's request certain conditions for his protection should be included with the offer.

Elizabeth was killed in an accident on November 27, 1963 without making the offer and without conveying to petitioner. Oranna B. Moosman was appointed administratrix of Elizabeth's estate. Petitioner filed a creditor's claim against the estate on the basis of the 1959 sales contract and mortgage. (App. VIII of Petition). The petitioner did not inform the court or the attorney for the estate of the 1960 agreement. Pursuant to court order the administratrix conveyed the land to petitioner by a September 21, 1964 deed which was recorded on October 5, 1964. The pending suit was brought by the tribe on September 20, 1967.

## ARGUMENT

### I

### THE DECISION BELOW THAT THE UTE INDIAN TRIBE HAD A STATUTORY RIGHT OF FIRST REFUSAL UNDER 25 U.S.C. 677(n) WAS CLEARLY CORRECT.

The land involved in this controversy was a part of the tribal assets of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and was distributed to the mixed-blood members thereof, as a part of the division between the full-blood and mixed-blood groups as required by the Act of August 27, 1954 (25 U.S.C. 677[i]). The mixed-blood members determined that a partition of the land was impractical and decided to offer it to the highest bidder among their group with the proceeds to be divided among all members of the group. Elizabeth, a mixed-blood, purchased the land for the sum of $26,016.00 and the proceeds were divided among all of the mixed-blood members in accordance with the plan for distribution of the assets of the mixed-blood members to the individual members thereof as required by 25 U.S.C. 677[i]. As a part of the division among themselves, the mixed-bloods were thereby given an opportunity to bid upon the land without competition from the full-bloods or from outside parties. Elizabeth thus acquired the land in question by virtue of the plan for distribution among the individual members of the mixed-blood group, paying owelty to the other mixed-blood members in accordance with her bid. Elizabeth determined to dispose of her interest thus acquired when she entered into the agreement of October 28, 1959. Under such circumstances 677[n] clearly required that she first offer it to the members of the tribe, and no sale *of any interest*, prior

to termination of federal supervision, could be authorized without first offering it to the members of the tribe in such form as was to be approved by the Secretary.

Petitioner stated, at page 5 of his brief:

> Said section of the Act. [677(n)] further provided that federal supervision *over mixed-blood land*, including the offering requirement, was to terminate on August 27, 1964. (Emphasis added).

Section 677[n] does not provide when federal supervision shall terminate. In fact, it does provide:

> After termination of federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of such period.

The ten year period expired on August 27, 1964. The requirement of such offer, in form approved by the Secretary, became a covenant to run with the land, ending August 27, 1964, and was explicitly so provided in the patent issued to Elizabeth prior to the expiration of said period. Elizabeth did not make the offer as required by law and the court has granted equitable relief to avoid thwarting the expressed intent of Congress.

At page 8 of petitioner's brief it is stated:

> Elizabeth's patent was recorded on November 14, 1960 (See Appendix IX). One of the provisions in the patent was as follows:
>
> > Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blood and mixed-blood groups of the Ute Indian Tribe . . .

The balance of the provision in the patent which was not quoted by petitioner is as follows:

> of the Uintah and Ouray Reservation in accordance with regulations now or hereafter prescribed by the Secretary of the Interior pursuant to the Act of August 27, 1954 (68 Stat. 868). This provision shall also apply to any successor in interest of such grantee who is also a member of the mixed-blood group as defined in the act, it being the intention of this provision to effectuate the purpose of Section 15 thereof. (App. IX of Petition, p. A-53).

Quoting only part of the provision is misleading since it would appear from the first sentence that the offer need not be made until disposition of the interest. The specific language set forth in the patent was provided by 25 C.F.R. §243.4. (App. XII of Petition, p. A-65). A significant part of Section 15 of the statute which is referred to in the above quotation, is:

> In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from the date of enactment of this act, he shall first offer it to members of the tribe, and no sale of any interest, prior to termination of federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period. (25 U.S.C. §677[n], App. XI of Petition, p. A-62).

Thus it will be seen that the requirement of first offering to members of the Tribe shall be made when the mixed-

blood member determines to dispose of his interest, not when he disposes of it as implied from the partial statement in petitioner's brief. Under some circumstances it may be extremely difficult to ascertain the subjective intent of a person, but here Elizabeth agreed in writing:

> WHEREAS, party of the second part desires to sell said property to party of the first part for Thirty-Five Thousand Dollars ($35,000.00) and,
>
> * * * *
>
> 1. Party of the second part agrees to sell, and party of the first part agrees to purchase the following described real property situated in Wasatch County, State of Utah, to-wit . . . (App. V of Petition, pp. A-40, A-41).

Perhaps the most reasonable interpretation to be given the statute would vest a right of first refusal in the Tribe upon actual acceptance of an original offer. This interpretation allows this mixed-blood Indian the opportunity to change her mind up until the time of actual acceptance of the offer as in normal contract law.

The trial court found that "Elizabeth C. Bumgarner *determined to dispose of her interest* in the lands, the subject of this litigation, on or prior to October 28, 1959 . . . " (Emphasis added) (App. I of Petition, p. A-9). Although there was no attempt made to have the contract approved by the Secretary or otherwise comply with the law, the acceptance of petitioner's offer by execution of a written agreement is sufficient to unconditionally vest the right of first refusal as required by 25 U.S.C. §677[n].

## II

## THERE IS NO CONFLICT OF DECISION.

### A. Termination Date.

Petitioner presents as his second question for review whether the United States Court of Appeals for the Tenth Circuit committed reversible error by holding that the bidding provision of 25 U.S.C. §677[n] did not terminate on August 27, 1964. The Court of Appeals made no such holding. In fact it stated:

> Until August 27, 1964 a patent conveying any tribal land to a mixed-blood had to provide that until that date members of the tribe had the right of first refusal of an offer to sell. (25 U.S.C. §677[n], 25 C.F.R. §243.4, App. III of Petition, p. A-27).

The Cort of Appeals further stated:

> The question remains of what relief the court should fashion to remedy the wrong. When federally-secured rights are invaded federal courts must adjust their remedies to grant appropriate relief. J. I. Case Co. v. Borak, 377 U.S. 426, 433; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414, n.13. It is impossible to reconstruct what would have occurred if Elizabeth had made the required offering. In addition the ten year period fixed by the statute has lapsed. (App. III of Petition, p. A-33).

Petitioner's third question for review is dependant upon the substance of its false assumption in its second question. Since the court did not hold that the bidding provisions of 25 U.S.C. §677[n] did not terminate on August 27, 1964, there is no conflict with the *Reyos Case*. (App. XIII of Petition). The case at bar was not over-

looked in the *Reyos Case*. The *Reyos Case* cited the *Probst Case*, stating:

> The right was granted clearly to permit the members of the Tribe, the Tribe, or the full-blood members to have the first right to purchase property which was for their benefit in an economic and practical way, and if any purchase was to be made, the members of the Tribe or the Tribe had to do it. (App. XIII of Petition, p. A-79).

B. Waiver, Laches and the Statute of Limitations.

Petitioner alleges that the lower court's decision in the instant case regarding waiver, laches and the statute of limitations is in conflict with the decisions of this court, other courts of appeal, and even its own earlier decision in *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945). Petitioner's assertion rests upon the false notion that the Tribe commenced this action after the three year Utah Statute of Limitations had run. Both the trial court and the Court of Appeals for the Tenth Circuit reached the inescapable conclusion that the events which gave the Tribe notice of the conveyance occurred within the three years before the institution of the suit since it was impossible for the Tribe to have knowledge of the Probst-Bumgarner transaction prior to its completion on September 12, 1964. Notwithstanding the specific finding of the lower courts in the instant case, petitioner insists upon recounting in laborious detail his version of the evidence made "mountainous" by petitioner's unflagging redundancy. Lest the court be misinformed, the trial court held:

> In the summer of 1966 plaintiff [Ute Indian Tribe] by and through its employees and agents and the administratrix of Elizabeth C. Bumgarner's estate

> first discovered the fraudulent scheme, artifice and design employed by defendant Probst in connection with his contracts and relations with Elizabeth C. Bumgarner to prevent others from having an opportunity to purchase said property as provided by law and could not by reasonable diligence and inquiry have sooner discovered said unlawful scheme, artifice and design. (App. of Petition, pp. A-17, 18).

The Court of Appeals for the Tenth Circuit further found:

> The reliance of Probst upon laches is misplaced. The analogous, but inapplicable, Utah statute of limitations is three years. As we have heretofore pointed out, the events which gave the Tribe notice of the conveyance without the required offer occurred within three years before the suit was brought. In the circumstances, the burden is on the defendant to show extraordinary circumstances which require the application of the doctrine of laches. Shell v. Strong, 10 Cir., 151 F.2d 909, 911. Probst made no such showing. (App. IV of Petition, pp. A-38, 39).

Petitioner's claim of conflict of decision, based upon the imagined change of position of the Court of Appeals, is frivolous. By requiring petitioner to show extraordinary circumstances, making necessary the application of the doctrine of latches, the Court of Appeals leaves the law unchanged with respect to the burden of proof applicable to the defense of laches, especially as it was enunciated by that court in the *Shell Case*:

> When a suit is brought within the time fixed by the analgous statute, the burden is on the defendant to show, either from the face of the complaint or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches. (*Shell v. Strong, supra*, at 911).

At page 10 of petitioner's brief it is stated:

> Based upon said minute entry, the Trial Court made the following Findings of Fact:
>
> "27. As early as November 18, 1959 plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation had knowledge of the October 28, 1959 executory sale of and between Elizabeth C. Bumgarner as seller and Parley Probst as buyer, said knowledge being evident by the minutes of a meeting of said tribe on November 18, 1959. . . "

This partial quotation is indeed misleading since the remaining portion of the finding conveyed the contrary opinion, which is as follows:

> While plaintiff was further aware of Probst's continuing interest in 1960, it had no notice or knowledge of any fraud in connection with the sale of said land (except as may have been constructively given by the recording of the Administratrix's Deed without posting having been made) until the year before the commencement of this action, September 20, 1967. (App. II of Petition, pp. A-15,16).

An inaccurate statement, not supported by fact or evidence, that Boyden was a member of the Tribal Business Committee (Brief of Petitioner, p. 10), or emphasis on the words "isolated tract," when all Section 9 lands (25 U.S.C. 677-[h]) were isolated tracts, adds nothing to the determining factors. The fact remains that the circumvention of the statute was not complete until the deed was obtained and recorded.

Petitioner further contends that *Holmburg v. Armbrecht*, 327 U.S. 392 (1946), has been misapplied to the instant case on the ground that the Tribe possessed potential

legal remedies in addition to the equitable remedies sought by this action. As correctly stated by the Court of Appeals for the Tenth Circuit:

> Plaintiff-appellant Ute Indian Tribe sued for certain equitable relief and for cancellation of a deed given by defendant-appellee Oranna Moosman as administratrix of the estate of Elizabeth Bumgarner Poowegup to defendant-appellant Parley Probst. (App. III of Petition, p. A-26).

Land is unique and there are no legal remedies which provide the relief sought by the Tribe in enforcing its right of first refusal.

III

THERE IS NO CONSTITUTIONAL QUESTION INVOLVED.

The purported constitutional issue is asserted by reason of the Court of Appeals for the Tenth Circuit allegedly changing the existing law by placing a different and onerous burden of proof on petitioner, thus taking petitioner by surprise and depriving him of his property without due process of law. As discussed in the preceding section, the law applied by the lower court is consistent with its own prior decision in the *Shell Case*, *supra*, and the decisions of this court referred to by petitioner. If petitioner misapprehended that law, there is no logical basis for the proposition that when he was schooled by the Court of Appeals, it constituted an unlawful taking of his property.

## IV.

## THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The absurdity of the assertion that the lands involved in this action are marginal is exceeded by the exaggeration of the impact of the decision upon other supposed transactions. The offering period expired over six years ago and this is the only controversy for failure to offer tribal lands to the Tribe as required by law. Petitioner has either little faith in the assertion that this action, commenced over three years ago, was then barred, or he values not the jewel of consistency.

Petitioner alleges that the door to a multitude of inappropriate litigation has been opened by granting equitable relief to the Tribe. In support of his position he introduces, via the appendix to this petition (App. X of Petition), evidence that was not before the trial or appellate courts. Although this matter is improperly before the court, it will be answered on its merits in respondent's brief in opposition to a companion petition for a writ of certiorari, No. 638, filed by the administratrix of Elizabeth's estate. Determination of the alleged issue between the Ute Indian Tribe and former mixed-blood members of the tribe, who are not parties to this litigation, can have no bearing upon the judicial determinations that have been made against the actions of petitioner Probst. If there is a federal question on this point, petitioner is not a party to it.

The petitioner who entered into a written contract to circumvent the law (App. VI of Petition), never requested

the approval of the Secretary of the Interior on his contract or mortgage (App. III of Petition, p. A-28), failed to describe the nature of the contract in the mortgage (App. VII of Petition, p. A-47), with fraudulent intent failed to disclose to the Utah Probate Court the agreement in circumvention (App. II of Petition, p. A-13, Findings 17 & 18), obtained an adverse decision in the trial and appellate courts, then appeals to the conscience of the highest court in the land, is desperate in his persistence, but falls far short of making an important federal question meriting the consideration of this court.

## CONCLUSION

From the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated this 28th day of September 1970.

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